Mandatory Greenhouse Gas Reporting Rule: EPA's Response to Public Comments

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FOREWORD

This document provides EPA's responses to public comments on EPA's Proposed Mandatory Greenhouse Gas Reporting Rule. EPA published a Notice of Proposed Rulemaking in the Federal Register on April 10, 2009 (74 FR 16448). EPA received comments on this proposed rule via mail, e-mail, facsimile, and at two public hearings held in Washington, DC and Sacramento, California in April 2009. Copies of all comments submitted are available at the EPA Docket Center Public Reading Room. Comments letters and transcripts of the public hearings are also available electronically through *http://www.regulations.gov* by searching Docket ID *EPA-HQ-OAR-2008-0508.*

Due to the size and scope of this rulemaking, EPA prepared this document in multiple volumes, with each volume focusing on a different broad subject area of the rule. This volume of the document provides EPA's responses to significant public comments received for Legal Issues.

Although the other volumes provide the verbatim text of comments extracted from the original letter or public hearing transcript, this volume summarizes the significant, relevant legal comments and provides responses thereto. In some cases, EPA provided responses to specific comments or groups of similar comments in the preamble to the final rulemaking. Rather than repeating those responses in this document, EPA has referenced the preamble.

While every effort was made to include all significant comments related to Legal Issues in this volume, some comments inevitably overlap multiple subject areas. For comments that overlapped two or more subject areas, EPA assigned the comment to a single subject category based on an assessment of the principle subject of the comment. For this reason, EPA encourages the public to read the other volumes of this document with subject areas that may be relevant to Legal Issues.

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1.1 STATUTORY AUTHORITY

1.1.1 Appropriations Act

Comment: Several commenters argued that the FY2008 Consolidated Appropriations Act (Appropriations Act) is the sole source of authority for the Reporting Rule. They contended that EPA's authority to require GHG reporting stems from the Appropriations Act alone. These commenters note that the Joint Explanatory Statement referencing EPA's Clean Air Act authority is not equivalent to statutory language and hence is not binding. Commenters cited to Supreme Court precedent to argue that "indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency" (citing Lincoln v. Vigil, 508 US 182, 192-93 (1993); Cherokee Nation v. Leavitt, 543 US 631, 646 (2005) ("The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding.")).

Other commenters, on the other hand, argued that the Appropriations Act could not provide independent legal authorization for the reporting rule. Some argued that appropriations bills do not provide broad and enduring authority for agencies to create new programs. Rather, they continued, appropriations bills are time limited, creating funding and policy actions that cannot extend beyond the scope of the direction in the bill (citing e.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, 190-91 (1978); Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005)). They also pointed to the example of how for many years Congress included a moratorium on the development of American offshore oil and natural gas resources in appropriations bills – however, because of the time limited nature of the appropriations bills, the moratorium had to be inserted for each fiscal year. They argued that the GHG reporting requirement must be read in a similar context.

Finally, still other commenters generally noted that it was not clear on what statutory authority EPA was relying. They pointed to interagency comments on a draft of the proposed rule from the last Administration to argue that EPA has recognized that the statutory language of the Appropriations Act "does not, in its own terms, indicate what authority EPA is to invoke in order to require mandatory emissions reporting of greenhouse gases or otherwise indicate a policy purpose for this endeavor." (See Doc. No. EPA-HQ-OAR-2008-0508-0056.2).

Response: *As discussed in the preamble, EPA is issuing this rule under the authority of the Clean Air Act (CAA or Act), not the Appropriations Act. The Appropriations Act instructed that EPA spend a specific amount of money on a rule requiring the reporting of GHG emissions across the economy. It did not prohibit rulemaking unless an appropriation of funds is enacted each year as implied by some of the commenters.*

The Joint Explanatory Statement accompanying the Appropriations Act noted that EPA should use its existing CAA authority for the rule. As discussed below, EPA has ample authority under the CAA for this rule, and thus, did not and does not need to rely on any authority conveyed in the Appropriations Act for this rule. As discussed in detail below, EPA could have issued this rule absent the direct instruction from Congress to spend at least a certain amount of money on a mandatory GHG reporting rule.

Comment: Some commenters asserted various legal flaws with the rule to the extent it was authorized by the Appropriations Act. Some commenters took the position that the Appropriations Act authorized a one-time expenditure of money, and thus authorized only a one-time data collection and not a rule with annual reporting requirements across many sectors of the economy. They continued that the limited funds authorized by Congress rendered it impossible for EPA to maintain the allegedly indefinite and overly expansive reporting program proposed. At least one commenter made the additional argument that the one time data collection could occur only in the fiscal year for which the appropriation was issued. At least one commenter cited interagency comments on a draft of the proposed rule from the last Administration to support its argument that EPA recognized that "[b]y proceeding using the authority of the Appropriations Act, rather than the Clean Air Act, EPA would be limiting the scope and time period that the program would be effective, consistent with the appropriations law that made available the funds to create this program." (See Doc. No. EPA-HQ-OAR-2008-0508-0056.2.)

Moreover, because they argued that the Reporting Rule is authorized by the Appropriations Act, and not the Clean Air Act (CAA), commenters contended that violations of the Reporting Rule would not and cannot be violations of the Clean Air Act, enforceable under the CAA; moreover, the Appropriations Act cannot be read to provide independent enforcement authority. Other commenters noted that section 821 of the CAA Amendments of 1990 also is not part of the CAA and that to the extent the reporting rule relies on 821 it also is not enforceable under the CAA. Other commenters argued that the Appropriations Act language was so scarce and the issues related to which industry sectors to cover so important, that the Appropriations Act violated the nondelegation doctrine (e.g., Congress should be making the decisions that EPA is making in the rule). Specifically, they argued that by failing to delineate the policy behind, and boundaries of, this delegated authority, the Appropriations Act violates the separation of powers doctrine (citing St. Louis Terminal Merchants' Bridge Ry. Co., 188 F. 181, 191 (1911); Railway Executives' Ass'n v. Skinner, 934 F.2d 1096 (9th Cir. 1991); Ministretta vs. United States, 488 U.S. 361 (1989)). They questioned whether one sentence in the Appropriations Act is sufficient to meet these standards.

At least one commenter argued that the Appropriations language authorized the reporting of emissions, but not the monitoring or other requirements of the proposed rule because appropriations legislation is to be construed narrowly. They took the position that this is a so-called Chevron Step One issue because the term "emissions" unambiguously means material that is actually discharged into the air. Therefore, they concluded, EPA has no authority to require anything more than emissions to be reported. Finally, at least one commenter argued that because we missed the statutory deadlines for proposing and finalizing the rule, the Appropriations Act no longer authorized the rule.

Response: *As discussed above, this rule is being issued pursuant to EPA's authority under the CAA, not the Appropriations Act.*

The FY2008 and FY 2009 Appropriations Acts instructed EPA to spend a minimum amount of money on such a rule. These funds could be used for no other purpose. The funds appropriated were available for obligation in Fiscal Years 2008-2010. The fact that the Appropriations Acts cover individual fiscal years does not mean that EPA cannot write a rule using money from those fiscal years that requires ongoing reporting requirements. The only limits are on the dates by which EPA must obligate the specific appropriated funds for the rulemaking effort, and EPA met those requirements. Moreover, there is no limit on EPA's ability

to write a rule that goes further than required by the instructions in the Appropriations Act, as long as the monies identified in the Appropriations Act are spent on the purposes indicated in the Appropriations Act and EPA has other authority for its actions, as is the case here. As discussed below EPA was authorized to develop this rulemaking under the CAA before the Appropriations Act was passed. The Appropriations Act merely required that EPA spend a certain amount of money on such an effort. As explained below, this rule is consistent with the instructions on how to spend the funds provided in the Appropriations Act. The fact that EPA missed the deadlines in the Appropriations Act for proposing and finalizing the rule did not remove any authority EPA has to expend the funds or to issue the rule under the authority of the CAA, anymore than EPA's missing other general statutory deadlines for issuing rules strips EPA of authority to issue those rules, albeit late. The language in the Appropriations Act was not written in a way that removed EPA's preexisting regulatory authority if the Agency missed the deadline for promulgating the final rule. See AMC v. Thomas, 772 F.2d 640, 643-44 (10th Cir. 1985) (1983 amendment to the Uranium Mill Tailings Radiation Control Act required that if EPA failed promulgate standards by a certain date the "authority of the Administrator to promulgate such standards shall terminate" in favor of the Nuclear Energy Commission.).

This rule is being issued pursuant to the CAA, therefore, violations of this rule would be violations of requirements of the CAA. Because this rule is being issued pursuant to sections 114(a) and 208 of the CAA, any concerns about whether section 821 of the 1990 CAA Amendments is part of the CAA and enforceable under it are irrelevant.

Similarly, because this rule is being issued pursuant to the CAA, not the Appropriations Act, comments questioning whether one sentence in an Appropriations Act was a valid delegation of authority are irrelevant. The Appropriation Act required that EPA obligate a minimum amount of funds to develop the rule by September 30, 2009 and the Agency did so.

Finally, while it is true that the Appropriations Act discusses the reporting of "emissions" it does not define the term, nor prohibit the collection of information necessary to verify the accuracy of such emissions. Assuring the accuracy of the data regarding the level of GHG emissions renders that information more valuable and useful. This approach is consistent with the definition of "emissions data" in EPA's regulations, which recognizes that "emissions data" covers data elements beyond the mere level of pollutants being emitted. See 40 C.F.R. 2.301(a)(defining emissions data to include "[i]nformation necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of any emission . . . ."); 56 Fed. Reg. 7642 (1991) (clarifying, "without attempting to be comprehensive, that information which the EPA generally considers to be emissions data . . . "). See below for further discussion of EPA's authority to gather information under this rule.

1.1.2 Clean Air Act

C**omment:** Some commenters questioned the use of the Clean Air Act for any action related to GHG emissions, including this reporting rule. They generally argued that the Clean Air Act was not written or intended to deal with global issues such as climate change. They provided a brief review of the Clean Air Act in support of their argument that EPA lacks the authority for this rule regarding GHGs. Other commenters noted that EPA has previously indicated that the CAA is not the appropriate vehicle for regulating GHG emissions, citing the Advance Notice of Proposed Rulemaking (ANPR), 73 Fed. Reg. 44,354 (July 30, 2008), and argued that any regulation under the Act, with respect to particular sources, requires specific findings by EPA of the need for such regulations. They suggest using other authorities, such as

the TRI. They argue that the Joint Explanatory statement noting that EPA should use CAA authority is not binding and that the statute itself is ambiguous.

Response: *The Supreme Court settled the issue of whether GHGs are "air pollutants" that may be regulated under the CAA (in the event any requisite findings are made first). Comments continuing to argue to the contrary are not relevant at this point. Importantly, as discussed below, there are no findings required before EPA may gather information regarding an air pollutant under section 114 and 208, as long as that information is related to carrying out the CAA (as is the information being gathered by this rule).*

Note that EPA's gathering data under this rule to inform its analysis of whether and how to use various authorities under the CAA does not mean that EPA has made any final determinations on how to proceed. Although EPA has indicated plans to regulate GHG emissions under certain provisions of the CAA, see Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions Standards and CAFE Standards, 74 Fed. Reg. 24007 (May 22, 2009), EPA is still in the process of evaluating other authorities and considering the myriad of pending petitions, ongoing rulemakings and litigation regarding EPA's use of the CAA to address GHG emissions and climate change. The data being gathered by this rule will inform those evaluations.

Finally, as discussed in the proposed rule, the preamble for the final rule, and elsewhere in the record for this action, EPA is using its authority under the CAA for this rule. First, the Joint Explanatory Statement accompanying the Appropriations Act suggested as much, and as a general matter, EPA follows the advice in such statements. See"Administrative Control Of Appropriated Funds", Resources Management Directive 2520, Page 1-6 (December 1, 2004). Second, EPA believes that the CAA is the best fit of its existing authorities. For example, the Toxics Release Inventory (TRI), which several commenters suggested, does not appear to provide adequate authority for both upstream and downstream reporting, and of course such use of the TRI is not consistent with the legislative history of the Appropriations Act. It does not appear that TRI authority supports a system for upstream source reporting (e.g., TRI could not be used to require fuel manufacturers to report the amount of fuels sold into the US economy and/or the GHG emissions that ultimately occur when these fuels are combusted in vehicles and at downstream stationary sources). Moreover, major GHGs (carbon dioxide, methane, and nitrous oxide) are not currently listed under 40 C.F.R. § 372.65 as chemicals to which the TRI reporting requirements apply. Finally, some GHG emitters covered by this reporting rule may not currently be included in the NAICS covered by TRI.

Comment: Commenters noted that the "joint explanatory statement" which EPA referenced as support for the suggestion that Congress intended that EPA use existing CAA authority is not a joint explanatory statement of a committee of conference of the two houses of Congress, but rather an "Explanatory Statement" of the Chairman of the House Appropriations Committee. See U.S. Government Printing Office, Consolidated Appropriations Act, 2008, Committee Print of the Committee on Appropriations, U.S. House of Representatives, on H.R. 2764 / Public Law 110-161, at 7 (Jan. 2008). Although they admitted that Section 4 of Public Law 110-161 (preceding Division A) states that such a statement "shall have the same effect with respect to the allocation of funds and implementation of divisions A through K of this Act as if it were a joint explanatory statement of a committee of conference," they continued to contend that the statement is not statutory text and cannot provide statutory authority (see above).

Other commenters noted that while it is likely that reporting of GHG emissions under this rulemaking could provide information that "is relevant to EPA's carrying out a wide variety of CAA provisions" that may ultimately address the regulation of GHGs (assuming the Administrator has made any relevant endangerment findings), the fact is that the provisions of the FY08 Appropriations Act are not a part of the CAA. As such, they continued, it is not clear that the FY08 Appropriations Act can serve as the basis for using section 114(a)(1) for making reports, undertaking monitoring, sampling or otherwise providing "information" by such persons for purposes of sections "111, 112, or 129" of the CAA; for "determining" if any person is in violation of "a plan or standard"; or for "carrying out any provision" of the CAA.

Response: *EPA considers the Joint Explanatory Statement to be legislative history that guides its implementation of the Appropriations Act. It is EPA's general policy to follow such legislative statements. See "Administrative Control Of Appropriated Funds", Resources Management Directive 2520, Page 1-6 (December 1, 2004). As discussed elsewhere, we are not relying on the Appropriations Act itself to provide statutory authority for the rule. We are relying on CAA sections 114 and 208 based on our authority under those sections to collect information that is relevant to carrying out CAA provisions, as the commenters agree this rule will do. Our authority under sections 114 and 208 is not tied to or limited by the Appropriations Act. Rather, the Appropriation Act required that EPA obligate at least $3.5 million of Environmental Programs and Management funding in Fiscal Years 2008 and 2009 to develop this rule. Likewise, our CAA authority would have been just as available to us in the absence of any legislative history of the Appropriations Act.*

Comment: Several commenters argued that the proposed rule is too broad, and that section 114 does not authorize a rule that requires information from many sectors on an ongoing, indefinite basis. Such commenters questioned EPA's authority to impose such a broad-reaching and onerous program, particularly where, they argued, a substantial portion of the entities covered are not likely to be regulated under the CAA, because they are insignificant sources with respect to GHG emissions. Commenters argued that none of the stated purposes for the data justifies the frequency and duration of the reporting requirements, the imposition of burdensome new measurement protocols, nor the installation of extensive and expensive instrumentation. Further, they continued that EPA already has in its possession and continues to collect, detailed GHG emissions inventory data that are sufficient to meet the stated purposes the Agency asserts underlie the proposed rule.

Some commenters contended that the focus on information gathering under section 114 is on enforcement, not developing regulatory and nonregulatory options (citing Clarifying Statement, 123 Cong. Rec. H8662 (Aug. 4, 1977), as reprinted in 1977 U.S.C.C.A.N. 1502, 1573; United States v. Louisiana Pac. Corp., 908 F. Supp. 835, 841 (D. Colo. 1995) ("Section 7414 grants broad authority to the Administrator to ensure compliance with the CAA through recordkeeping, monitoring, and inspections.")). Others argued that historically EPA has not issued such sweeping requests for information in the form of a regulation, but rather has issued targeted letters to particular sources or industrial sectors. They further argued that because this expansive rule is a change to prior agency practice, the agency's expansive interpretation underlying the rule would be entitled to minimal, if any, deference (citing Watt v. Alaska, 451 U.S. 259, 273 (1981)). They cited to interagency comments on a draft of the proposed rule from the last Administration to argue that EPA itself has expressed reservations about its authority to interpret section 114 as broadly as the rule proposes, (See Doc. No. EPA-HQ-OAR-2008-0508-0056.2.) Commenters also contended that even in cases where EPA was developing an actual regulatory proposal for emission reductions as required by the Act, EPA has previously declined

to use its authority under Section 114 or has limited such requests because requests under section 114 can be time-consuming and costly. NRDC v. EPA, 529 F.3d 1077, 1085 (D.C. Cir. 2008).

Commenters further argued that Congress did not envision a rule of such scope and duration when fashioning section 114. Indeed, they continued, for EPA to read 114 so broadly would render information collection authorities elsewhere in the rule superfluous. In particular, they noted that Congress would not have had to add section 821 of the 1990 CAA Amendments regarding the collection of CO2 from power plants covered by the Acid Rain Program if EPA were already authorized to collect such data under section 114. They also generally mentioned the monitoring requirements in section 112, Title IV, and Title VI of the CAA, among others.

Commenters invoked the concept of "ejusdem generis" when arguing that Congress cannot have meant "carrying out any provision of the Act" to be as broad as EPA reads it – rather that phrase should be read considering the narrow examples of use of 114 authority that precede it (e.g. compliance and establishment of certain standards). Thus, they continued, EPA cannot cite to section 103 of the Act to support the information request because section 103 does not mention the words "monitoring" or "reporting," only words such as "studies," "surveys," "investigations," and similar discrete, one-time or time-limited activities. They argued that the expansive interpretation EPA advocates would violate this rule; thus the catch-all phrase cannot be understood to expand section 114 to authorize monitoring and reporting on pollutants not yet considered "pollutants subject to the Act." (see below) Commenters also argued it is not appropriate to cite to section 103(g) because this provision relates to nonregulatory actions, and specifically states that section 103(g) provides that "[n]othing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements."

Some commenters argued that EPA did not provide sufficient explanation of which provisions of the Act were tied to the information being gathered by the rule. They noted that while EPA claims that "it is appropriate for EPA to gather the information required by this rule because such information is relevant to EPA's carrying out a wide variety of CAA provisions," it also admits that it "does not yet know the specific policies that will be adopted," citing the Supporting Statement Part A: Information Collection Request For The Mandatory Reporting Of Greenhouse Gases – Proposed Rule, at 3 (Mar. 16, 2009) (OAR-2008-0507-01 79). Commenters argued that generalized suppositions as to how the information might be used at some indeterminate time in the future provide wholly inadequate justification for an information request of the size, scope, and duration that EPA has proposed. They continued that EPA has a fundamental obligation to assert a rational basis for implementing its authority under Sections 114 and 208, which includes in this case a particularized explanation of the reasons EPA actually, currently needs this information (versus a "wish list" of programs and policies that might be "informed" by gathering this information).

Commenters cautioned EPA against trying to use the proposed reporting rule as a way to anticipate or lay the groundwork for future climate change legislation. They recommended that until EPA clearly identifies the policy options it will pursue with respect to greenhouse gas emissions, EPA should limit the proposed rule to require the collection of reasonably accurate and complete data using readily available sources or estimation methods. They continued that it would be inappropriate at this time for EPA to require the level of exquisite precision that would be necessary in the context of a compliance-oriented regulatory program.

At least one commenter argued that EPA cited the CAA, rather than the Appropriations Act, as the legal authority for the reporting rule possibly in an effort to justify monitoring as well

as reporting requirements and to avoid limitations on the duration of the program. However, they go on to argue that EPA has exceeded its authority (see above re comments regarding Appropriations Act being sole authority for the rule). They also cited to interagency comments on a draft of the proposed rule from the last Administration to argue that EPA has expressed reservations about its authority to promulgate the proposed rule under section 114, and agrees that these alleged reservations are well founded. (See Doc. No. EPA-HQ-OAR-2008-0508-0056.2.)

At least one commenter challenged EPA's interpretation of the "persons" who may be subject to an information collection request under section 114. They argued that Section 114 must be read in light of the entire statute, which they claimed authorizes data collection only from certain persons that are subject to the Act's requirements (citing 42 U.S.C. § 7414(a)(1) and asserting Section 114 applicability is limited to "any person who owns or operates any emission source, who manufactures emission control equipment or process equipment, who the Administrator believes may have information necessary for the purposes set forth in this subsection, or who is subject to any requirement of this chapter (except a provision of subchapter II . . .)"). Thus they claimed that the applicability of Section 114 is thus limited to entities who own or operate an emission source or who are subject to regulation under the CAA for a given air pollutant, and EPA's attempt to collect data under Section 114 from persons who are not owners or operators of an emission source or who are not subject to regulation under the CAA exceeds Section 114's authority and is improper

Other commenters supported EPA's use of section 114, agreeing that it (and section 208) contain broad delegations of authority to collect information, including from sources or pollutants not currently subject to regulation under the Act. They noted that Congress repeatedly expanded EPA's authority under 114. For example, they highlighted how Congress has broadened its applicability and scope "to persons not previously covered by section 114" (citing See H.R. Conf. Rep. 95-564, Aug. 3, 1977; P.L. 93-319, § 6(a)(4) (June 22, 1974); P.L. 95-95, §§ 109(d)(3), 113, 305(d) (Aug. 7, 1977); P.L. 95-190, § 14(a)(22), (23) (Nov. 16, 1977); P.L. 101-549, §§ 302(c), 702(a), (b) (Nov. 15, 1990). Indeed, they contended that the 2008 and 2009 Appropriations Acts itself is a signal that Congress believes the CAA grants EPA broad information gathering authority. These commenters also supported the scope of the rule, and the other decisions EPA made in developing the rule (e.g., thresholds and frequency of reporting).

Response: *Section 114 generally authorizes EPA to gather information from any person who owns or operates an emissions source, who is subject to a requirement of the CAA, who manufacturers control or process equipment, or who the Administrator believes has information necessary for the purposes of section 114(a). EPA may gather information for purposes of establishing implementation plans or emissions standards, determining compliance, or "carrying out any provision" of the Clean Air Act. For these reasons, the Administrator may request that a person, on a one-time, periodic or continuous basis, establish and maintain records, make reports, install and operate monitoring equipment and, among other things, provide such information the Administrator may reasonably require. This language has been interpreted to grant EPA broad authority. See, e.g., Dow Chemical Co. v. U.S., 467 U.S. 227, 233 (1986) ("Regulatory and enforcement authority generally carries with it all modes of inquiring and investigation traditionally employed or useful to execute the authority granted.").*

While it is true that in the past EPA has generally used its information gathering authority under section 114 in a more targeted manner, typically sending information collection request letters to specific sources for enforcement purposes, or particular industrial sectors for

regulatory purposes, there is nothing in section 114 that precludes this broader, yet still targeted, rulemaking. Nor can interagency comments on drafts of the proposed rule from the prior Administration indicate a prior final agency position to the contrary or otherwise undermine the deference accorded to EPA when interpreting the statute it was delegated authority to implement. Section 114 clearly authorizes the collection of information for purposes of carrying out any provision(s) of the Clean Air Act. It is not limited to enforcement or compliance assurance activities, as noted by the language clearly indicating that it was appropriate to gather information under section 114 to develop implementation plans and standards, as well as carry out any provision of the Act. It is not surprising that the enforcement case cited by commenters, United States v. Louisiana Pac. Corp., 908 F. Supp. 835, 841 (D. Colo. 1995), highlights EPA's enforcement authority under section 114, but that does not mean that EPA does not have authority to gather information for other reasons under that section. As explained below, because EPA is analyzing broadly how best to address the problem of climate change under the CAA, including both regulatory and nonregulatory options, a rule that requests detailed information from a broad spectrum of sources is reasonable.

Moreover, EPA is not issuing this rule pursuant to the CAA versus the Appropriations Act in order to avoid alleged limitations in the supposed authority granted by the Appropriations Act. As discussed in the proposed rule and elsewhere in this document, Congress indicated its intent that we use existing authority under the CAA to issue this rule. EPA agreed that the CAA was the best legal authority. Regarding commenters' argument that in an earlier draft of the proposed rule EPA "expressed reservations" about its CAA authority, that document does not support commenters' position. First, the interagency review materials placed in the docket pursuant to section 307(d)(4)(B)(ii), are not part of the record on review, CAA 307(d)(7)(A) . More importantly, the document in question reflects comments from another agency under the last Administration – it does not, as commenters alleged, reflect concerns that EPA has regarding its CAA authority. It is entirely appropriate for EPA to issue this rule under the CAA in that it gathers information to allow a comprehensive assessment of how to best use the CAA to address GHG emissions and climate change.

Regarding the comments discussing the "persons" who may be asked to provide information under section 114, the commenter focused on a subset of the persons listed under 114. Congress repeatedly broadened the scope of persons subject to 114 – first adding any person subject to the CAA in 1977, and then expanding it to include manufactures of control equipment and any person "who the Administrator believes may have information necessary for the purposes" of section 114. See H.R. Conf. Rep. 95-564, Aug. 3, 1977; P.L. 95-95, §§ 109(d)(3), 113, 305(d) (Aug. 7, 1977); P.L. 95-190, § 14(a)(22), (23) (Nov. 16, 1977); P.L. 101-549, §§ 302(c), 702(a), (b) (Nov. 15, 1990); see also CED's Inc. v. EPA, 745 F.2d 1092, 1097 (7th Cir.), cert. denied, 471 U.S. 1015 (1984). Thus, section 114 is not limited to persons who own or operate an emission sources or are otherwise subject to regulation under the CAA. We note, however, that the vast majority of sources reporting under this rule are sources of emissions. See below for more discussion on this topic.

It is true that EPA has never issued a reporting rule of this scope under section 114 before. It is also true, however, that EPA has never undertaken such a comprehensive evaluation of how to address an air pollution problem under the CAA from the outset. And EPA has never undertaken such a comprehensive evaluation of emissions for pollutants like GHGs (which are long lived and therefore become well mixed in the atmosphere), and to address a phenomenon like climate change (which while global in nature, has regional impacts. Thus, it is not surprising that EPA is undertaking a unique approach to gathering and evaluating

information to allow it to thoroughly analyze how best to address GHG emissions and climate change under the CAA. Rather than proceeding piecemeal, gathering information from only certain sources, or using the information already available in whatever form, EPA is undertaking an effort to gather a consistent, comprehensive and accurate set of data to allow a full appraisal of the possible ways to tackle this unique issue.

In the proposed and final preambles to this rule, EPA briefly describes some of the numerous provisions of the CAA the implementation of which would benefit from the information being gathered by this rule. See NPRM, 74 FR 16454-55. In July 2008, EPA discussed potential regulations of GHG under the CAA more broadly in an Advance Notice of Proposed Rulemaking (ANPR). Regulating Greenhouse Gas Emissions Under the Clean Air Act, 74 Fed. Reg. 44354 (July 30, 2008). In that ANPR, EPA discussed the various CAA provisions that may be applicable to regulation of GHGs, examined the issues that regulating GHGs under those provisions might raise, and provided information regarding potential regulatory approaches and technologies for reducing GHG emissions. The ANPR contains a long list of provisions of the CAA that EPA could potentially use to regulate GHG emissions. For stationary sources, these include the National Ambient Air Quality Standard and State Implementation Plan programs under sections 107-110 of the Act, New Source Performance Standards (NSPS) under section 111, National Emission Standards for Hazardous Air Pollutants (NESHAP or MACT) under section 112, standards for solid waste combustion under section 129, and the preconstruction new source review programs under sections 160-169 and 171-173. The ANPR also discussed the various provisions under title II of the Act regarding mobile sources and the fuels used by them –- motor vehicles under section 202, nonroad engines under section 213, aircraft under section 231, fuels under section 211.

While, as acknowledged in the ANPR, some of these provisions appear to provide better options than others, EPA is in the process of a thorough evaluation of how to best address GHG emissions, and the problem of climate change, under the Clean Air Act. The comprehensive information being collected in this rulemaking regarding GHG emissions and their origin will allow EPA to fully evaluate the options before it, without having to decide to narrow its options at the outset. The more targeted approach advocated by some commenters would require some level of decision making without the benefit of the information gathered to be by this rule.

More specifically, in the proposed rule EPA discussed how the information should inform decisions about whether and how to use section 111 to establish NSPS for various source categories emitting GHGs, including whether there are any additional categories of sources that should be listed under section 111(b). There are several pending decisions before EPA regarding the use of section 111 to address GHG emissions. For example, EPA has been sued regarding our failure to perform the 8-year periodic review of the NSPS for two source categories (e.g., nitric acid plans and oil and natural gas production); in the Notices of Intent (NOI) to sue for those lawsuits, the plaintiffs specifically mentioned that they believed EPA should be establishing GHG standards for those categories as part of the periodic review. The Agency has also received a similar NOI regarding the NSPS for landfills. EPA currently has pending before it a petition to reconsider the 2008 revisions to the refinery NSPS in part regarding EPA's decision to not establish GHG emissions standards as part of that review. In at least two ongoing NSPS reviews (Portland cement and coal preparation plants) stakeholders have argued that EPA must include standards for GHG emissions from those source categories. EPA also has before it a remand in a judicial challenge to EPA's decision not to establish GHG emissions standards as part of the 2006 review of the industrial, commercial, institutional and electric steam generating boilers NSPS. State of New York, et al. v. EPA, No. 06-1322 (D.C.

Cir) (September 24, 2007 order remanding the case "to EPA for further proceedings in light of Massachusetts v. EPA"). Finally, EPA also has in-house a pending petition requesting that EPA regulate GHG emissions under numerous mobile source and stationary source CAA provisions, including section 111, due to concerns regarding the impact of climate change on the Arctic.

Regarding permitting programs, in the ANPR, EPA discussed potential revisions to the Prevention of Significant Deterioration (PSD) program and title V operating permit program regarding GHG emissions. 73 Fed. Reg. at 44497-516. EPA discussed the concept of proposing revisions to the applicability thresholds and streamlining options for GHG emissions in order to allow the effective and prudent implementation of these programs once they are triggered by regulation of GHGs under other provisions of the CAA. The ANPR included a discussion of the legal theories of administrative impossibility and absurd results and their relevance to whether EPA could immediately apply the statutory applicability thresholds of 100 and 250 tons per year (tpy) for GHGs due to the sheer number of sources that could newly be covered by those programs at those levels. For example, in the ANPR EPA estimated that the number of PSD major sources could increase ten-fold, and title V major sources could increase by a factor of more than 30, once GHGs are regulated pollutants under these programs. Utilization of these legal arguments would involve an analysis of the number and type of sources that would be covered under various thresholds, as well as possible options for streamlining implementation of the programs. The information gathered through this rulemaking will assist EPA in continuing to evaluate how to best administer the PSD and title V programs consistent with the statute. For example, information regarding the amount of fuel sold into commerce will help us evaluate the percentage of emissions addressed under various applicability thresholds. The information collected under this rule should also prove useful when evaluating technology options for sources that trigger the PSD program – by collecting information from a variety of sources within a source category, EPA will be able to look closer at sources with lower emissions to see what types of emission reduction opportunities exist for other sources. Moreover, the geographic distribution, production volumes and characteristics of various fuel types and subtypes may also prove useful is setting NSPS or Best Available Control Technology limits for some combustion sources. One idea under investigation by EPA is whether lifecycle emissions could be relevant to setting stationary source standards (e.g., do certain biomass have lower lifecycle CO2 emissions than fossil fuels). In addition, transportation distances from fuel sources (e.g., suppliers) to end users may be useful in evaluating cost effectiveness of various fuel choices, increases in transportation emissions that may be associated with various fuel choices, as well as the overall impact on energy usage and availability.

As discussed in the proposal, the information required of manufacturers of mobile sources should support decisions regarding treatment of those sources under sections 202, 213 or 231 of the CAA. As with stationary sources, there are several pending petitions requesting that EPA regulate GHGs from mobile sources and fuels used by mobile sources. In addition to the petition regarding motor vehicles under section 202(a) on remand to EPA after the Supreme Court's decision in Massachusetts v. EPA, there are nine petitions requesting that EPA regulate GHG emissions from nonroad engines (e.g., locomotives, marine engines, construction equipment) under section 213, rebuilt heavy-duty diesel engines under section 202(a)(3)(D), aircraft under section 231, and/or fuels under section 211. The information from fuel suppliers would be relevant in analyzing whether to proceed, and particular options for how to proceed, under section 211(c) regarding fuels.

The proposed rule discusses one particular CAA provision that was not raised in the ANPR. Section 103 of the Clean Air Act generally authorizes EPA to establish a national

research and development program for the prevention and control of air pollution. As one Congressman noted while debating the 1990 amendments to section 103,

> *Research and development is essential in the characterization of the adverse effects of air pollution, the development and evaluation of control technologies, and the generation of cost effective solutions. We believe that a firm base of scientific knowledge provides the foundation for sound and effective policy decisions.*

A Legislative History of the Clean Air Act Amendments of 1990 at 1249 (Congressman Roe during House Debate on Conference Report). A firm understanding of GHG emissions, from both upstream and downstream sources, similarly provides a sound foundation for effective research and development actions.

Under the auspices of this section EPA's Office of Research and Development has conducted and continues to conduct research on both criteria pollutants and greenhouse gas emissions. The National Risk Management Research Laboratory evaluates different possible energy futures dependent upon potential energy technology development and activity to understand emissions of sulfur dioxide, oxides of nitrogen and carbon dioxide (for more information see http://www.epa.gov/appcdwww/apb/globalchange). Improved emissions data will enable more accurate baseline estimates and a better understanding of how those emissions might change under future energy scenarios. Moreover, EPA has issued a variety of grants under section 103, indicating the breadth of activities covered by this section. For example, a team of researchers are exploring the possible impact of smart growth development practices on criteria air pollution and greenhouse gas emissions (see http://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/7405/report/0). Another example is the current solicitation for projects to develop and improve air pollution emission inventories (http://epa.gov/ncer/rfa/2009/2009_star_air_pollution.html). EPA is interested in supporting research that will advance scientific understanding leading to improvements in air pollution emissions information since emission inventories are relied on both to develop effective control strategies and reliable information about air quality trends for accountability, and to help produce accurate air quality forecasts. The greater our understanding regarding the level of emissions, as well as the differences within and between source categories, the better our ability to identify and prioritize research and development, as well as program, needs.

Moreover, EPA has implemented several voluntary programs under the authority of CAA section 103(g) of the CAA. That subsection states that in carrying out 103(a),

> *the Administrator shall conduct a basic engineering research and technology program to develop, evaluate, and demonstrate non regulatory strategies and technologies for air pollution prevention. . . . . Such program shall include the following elements:*
> *(1) Improvements in nonregulatory strategies and technologies for preventing or reducing multiple air pollutants, including . . . . carbon dioxide, from stationary sources, including fossil fuel power plants. Such strategies and technologies shall include improvements in the relative cost effectiveness and long-range implications of various air pollutant reduction and nonregulatory control strategies such as energy conservation, including end-use efficiency, and fuel-switching to cleaner fuels. Such strategies and technologies shall be considered*

for existing and new facilities.

Pursuant to this language, EPA has launched a variety of nonregulatory programs aimed at reducing emissions of GHGs, including Climate Leaders, ENERGY STAR, AgSTAR, the Coalbed Methane Outreach Program, the Natural Gas STAR Program, the Landfill Methane Outreach Program, as well as voluntary partnerships with particular industries to reduce high GWP GHG emissions. More information about these and other nonregulatory programs aimed at reducing GHG emissions can be found at http://www.epa.gov/climatechange/index.html.

The information gathered by this rule will improve EPA's research and development program as it relates to GHGs and climate change, as well as the Agency's nonregulatory approaches to preventing or reducing air pollutants. For example, information from direct emitters will inform our consideration of energy conservation, end-use efficiency and fuel-switching as possible strategies for reducing overall emissions. Additional data will also enhance EPA's implementation of various programs aimed at encouraging voluntary reductions in GHG emissions. This additional data which will be from many of the nation's largest sources of GHG emissions, fuel suppliers, and suppliers of industrial gases will help EPA by providing more detailed information on possible sources and industrial sectors for EPA to work with in the context of these programs and by providing important information that can be used to develop and enhance GHG management tools for key sectors, improve consumer oriented programs and information, perform quality assessments of existing tools, and measure progress in reducing emissions from key sectors.

As discussed below, it is entirely appropriate for EPA to gather information for purposes of carrying out section 103 in this rule, and doing so is not inconsistent with the language stating that nothing in 103(g) should be construed as authorizing the imposition of control requirements. That language in 103(g) is best read to mean that EPA must still make whatever requisite findings may be required under other sections of the CAA before imposing control requirements, even as EPA investigates non-regulatory options for reducing emissions.

The Agency does not agree that the doctrine of ejusdem generis requires that EPA interpret the language of section 114 as narrowly as some commenters advocate (e.g., limited to provisions involving emissions standards and for pollutants EPA had decided to control, and not research or nonregulatory strategies as mentioned in section 103). The doctrine of ejusdem generis is not strictly applied. Courts will not apply the rule where it would defeat or subvert the legislative intent or purpose in enacting the statute. See,U.S. v. Alpers, 338 U.S. 680, 682 (1950) (The rule of ejusdem generis "is to be resorted to not to obscure and defeat the intent and purpose of Congress, but to elucidate its words and effectuate its intent. It cannot be employed to render general words meaningless."). Moreover, it "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." Harrison v. PPG Industries, Inc., 446 U.S. 578 , 588 (1980) (citation omitted). The application of the ejusdem generis rule here would frustrate Congressional intent. As discussed further below, it simply would not make sense to interpret section 114 to prohibit gathering information on an air pollutant until a decision was made regarding whether to control emissions of that air pollutant. The very information being gathered under section 114 would assist in that evaluation (e.g.,. does a source category "significantly contribute" to air pollutant which endangers under section 111(b)). Thus, even reading the listed purposes for gathering information narrowly to include only development of emissions standards and implementation plans, or ensure compliance with either, as some commenters argue, would not preclude the collecting of information for purposes of evaluating whether to use these provisions to address GHGs.

Moreover, Congress repeatedly expanded EPA's authority under section 114. The fact that Congress highlighted certain potential uses of the information gathered under 114 does not mean it limited EPA's authority to gather information for other purposes. Given the breadth of authority granted to EPA in the CAA, it is not surprising that rather than listing each and every possible use of information, Congress relied on a catch-all phrase such as "carrying out any provision" of the Act (emphasis added). See State of New York v. EPA, 443 F.3d 880, 887 (D.C. Cir. 2006) ("Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use.") (footnote omitted).

Indeed, Congress' use of "any" indicates that it did not intend to limit EPA's authority to only certain kinds of provisions or only regulated air pollutants. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 529 n. 26 (2007) (indicating that section 302(g) definition of air pollutant was a "sweeping statutory provision" in part because of the use of the term "any" in the definition); State of New York v. EPA, 443 F.3d at 885 (noting that in "a series of cases, the Supreme Court has drawn upon the word 'any' to give the word it modifies an 'expansive meaning' when there is 'no reason to contravene the clause's obvious meaning.'"). Indeed, the language in section 114(a)(1) is similar to the language in section 307(b)(1) that the Supreme Court evaluated in Harrison v. PPG Industries. In that case, the Supreme Court refused to apply the doctrine of ejusdem generis to the phrase "any final agency action" in part because the Court did not find any uncertainty in the meaning of the phrase "any other final action." The Court noted that when Congress amended 307(b)(1), "it expanded its ambit to include not simply 'other final action,' but rather 'any other final action.'" 446 U.S. at 588-89 (emphasis in original). As with the use of "any" in the phrase "any other final agency action" in 307(b)(1), the use of "any" in the phrase "any provision [of the CAA]" also "offers no indication whatever that Congress intended the limiting construction" commenters urge. Id. at 589. We similarly construe "any provision" to mean exactly what it says, namely, any provision of the Clean Air Act. See also Abdus- Shahid M. S. Ali v. Federal Bureau of Prisons et al., 552 U.S. 214 (2008) (following reasoning of Harrison when interpreting other statutory language "any other law enforcement officer.").

Thus, commenters are in error in trying to narrow the reading of "any provision" of the Act to include only those provisions that involve emissions standards or air pollutants for which certain findings had already been made. Indeed, EPA has a variety of duties in the CAA that extend beyond the regulatory, and limiting the scope of section 114 as commenters urge would hinder EPA's ability to implement those provisions, and subvert Congressional intent. See, e.g., CAA §103(a)(the Administrator shall establish a national research and development program for the prevention and control of air pollution); CAA § 105 (regarding grants in support of air pollution planning and control programs); CAA §108(h) (establishment of RACT/BACT/LAER clearinghouse); CAA §117 (establishment of advisory committees); CAA §130(establishment of emissions factors); CAA § 166(a) (study regarding pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides and prevention of significant deterioration); CAA § 169A(a)(3) (study regarding visibility); CAA §183(g) (study regarding the methodology in use for establishing a design value for ozone); CAA § 202(a)(3)(D)(study regarding the practice of rebuilding heavy-duty engines). There is no indication that Congress intended such limiting construction of the Act. See Harrison v. PPG Ind., 446 U.S. at 589.

Nor does reading section 114 to authorize EPA to gather the information required by this rule render other parts of the CAA or 821 of the 1990 CAA amendments surplusage. The fact

that as part of the 1990 CAA Amendments Congress specifically required that EPA gather CO2 emissions from EGUs subject to the Acid Rain program does not mean that Congress believed that EPA did not have any authority to collect that information absent section 821 of the 1990 CAA Amendments. Rather, it signifies that Congress wanted to mandate that EPA gather such information from certain sources, rather than leave it to EPA's discretion. See, e.g., A Legislative History of the Clean Air Act Amendments of 1990 at 2986 (Congressman Moorehead noting during House debate that EPA "does not" collect data on CO2 emissions, versus stating that EPA can not collect such information); see also NRDC v. EPA, 529 U.S. 1077, 1085 (D.C. Cir. 2008) ("But section 114 is not a mandatory provision – it only states that EPA 'may' require sources to supply data."). Commenters also generally mention "monitoring requirements" in other sections of the Act in support of their argument, but they do not quote or cite to specific language in those sections that they believe is rendered surplusage, or otherwise indicate how EPA's interpretation is at conflict with or duplicative with language in those sections. Indeed, EPA often uses its authority under section 114 to gather information for purposes of administering those provisions. See, e.g., 63 Fed. Reg. 17406 (1998) (information collection request no. 1858.01 gathering information on mercury emissions from power plants); 69 Fed. Reg. 52403 (citing section 114 authority to obtain information on methyl bromide stockpiles for purposes of issuing "critical use" exemptions under CAA section 604). The fact remains that the language in section 114 clearly authorizes EPA to gather information for purposes of carrying out these, and other provisions, of the CAA, and commenters have not demonstrated how EPA's interpretation specifically renders any such language superfluous; mere general allegations will not suffice.

EPA does not believe that as a legal matter it has to have "picked" particular approaches before it can gather the information under this rule. The point of gathering information is to inform decisions regarding the legal, technical and policy viability of various options. To require a narrowing of those options beforehand would be putting the decisional cart before the informational horse.

In addition, the variety of purposes for gathering this information justifies the level of accuracy in reporting that the rule strives to achieve, as well as the ongoing annual reporting requirements. We disagree with commenters who believe that a less robust reporting program is appropriate now merely because we may require more stringent requirements (e.g., greater use of CEMs) in the event EPA establishes emissions standards or other requirements. An accurate baseline is essential when undertaking the comprehensive review regarding how best to tackle the critical issue of climate change. This rule establishes national methods for reporting emissions from similar facilities within industrial categories, and the data collected will enable a better understanding of emissions within particular sectors as well as across sectors. That type and level of detailed information is not available now. Importantly, if and when EPA does move forward to address GHG emissions under the CAA, it may revise this rule as appropriate. For instance, the requirements for reporting in this rule may meet the requirements for reporting under an emission standard in order to ensure compliance, negating the need to promulgate separate reporting requirements in the emission standards. On the other hand, EPA may move the reporting requirements from this rule to the emission standard. For example, rather than include the requirements for manufacturers of light duty vehicles in this final rule, EPA plans to address these reporting requirements as part of an EPA proposal to set GHG emissions standards for light duty motor vehicles. Thus, while this rule is written to require the annual reporting by sources that meet the applicability threshold (unless they meet the test for ceasing reporting in 40 CFR 98.2(i)), EPA is well aware that it may become appropriate to revise this rule in the future to reflect subsequent activities or requirements. However, given the breadth of

potential uses of the information (see above), the scope of the effort before EPA regarding evaluating how to address GHG and climate change under the CAA, and the current dearth of facility-level information (see discussion in general provisions response to comments (RTC) regarding the appropriate level of reporting), EPA believes that it is appropriate at this time to gather this information on a continuous basis.

Finally, we note that the Appropriations Act which instructed EPA to spend monies on a GHG reporting rule covering "all sectors of the economy" and the accompanying legislative language directed EPA to include upstream and downstream sources, and to consider thresholds and frequency of reporting. See also FY 2009 Omnibus Appropriations Act, PL 111-8, 123 Stat. 524, 729 (Mar. 11, 2009)(instructing that "not less than $6,500,000 shall be used for activities to develop and publish a final rule . . to begin implementation, to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy . . . as required by Public Law 110-161 ."). This language shows that Congress had in mind a broad rule gathering information from a wide variety of sources. As noted above, Congress stated its intent that EPA issue this broad rule using our existing authority under the CAA, indicating that Congress believed EPA had the authority under the CAA for a rule of this scope. Congress' understanding of EPA's broad authority demonstrates the reasonableness of EPA's interpretation.

The Supreme Court has recognized that research and information gathering efforts fit with an evaluation of regulatory efforts. Massachusetts v. EPA, 549 U.S. at 530 ("collaboration and research do not conflict with any thoughtful regulatory effort; they complement it."). The above discussion shows how a comprehensive inventory of GHG emissions, from both direct emitters and suppliers, will allow EPA to undertake a thorough and holistic evaluation of how to utilize existing authority under the CAA, both regulatory and nonregulatory, to address GHG emissions and climate change. Additional discussions regarding comments on particular sectors or data elements may be found elsewhere in this RTC or other RTC in the docket for this action.

Comment: EPA did not receive many general comments challenging its legal authority to gather information from downstream direct emitters of GHGs. Comments questioning the necessity of particular data elements under specific subparts generally are addressed in the response to comments documents for those subparts.

One commenter did challenge EPA's explanation for imposing regulations on the Lead Production sector. The commenter argued that because both primary lead smelters and secondary lead smelters are already subject to NSPS, and to date EPA has declined to regulate GHG emissions under these NSPS, EPA has no reason to include the sector in this reporting rule. They also pointed to arguments EPA has made in recent NSPS rulemakings on the topic of EPA's discretion regarding the establishment of GHG standards for existing listed source categories as a limit on EPA's ability to establish GHG standards for lead production (thus, making collection of the information under this rule irrelevant). The commenter argued that EPA already has sufficient information to find that facilities in the Lead Production sector do not warrant regulation of GHGs under Section 111 of the CAA, pointing to EPA's GHG inventory estimates of CO_2 emissions from Lead Production to be between 0.2 and 0.3 teragrams of carbon dioxide equivalents (Tg CO_2 Eq.) at the 95 percent confidence level. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2007, at 4-56 (Apr. 15, 2009) (hereinafter referred to as "EPA GHG Inventory"). They argued that these emissions are 0.00279% to 0.00419% of the total emissions estimated from the U.S. in 2007 (7,150.1 Tg CO_2 Eq.). They further noted that while GHG emissions in the U.S. has generally increased since 1990, EPA found that total

emissions from the Lead Production sector decreased by six percent since 1990, largely due to a decrease in primary production (68 percent since 1990) and a transition within the U.S. from primary lead production to secondary lead production, which is less emissive than primary production, although the decrease leveled off in 2005. Thus, they concluded that because this information must be interpreted to not support a finding that emissions of GHGs from this sector contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare, under section 111(b)(1), EPA cannot establish an NSPS for GHG from lead product, or gather information related to such a potential standards under this rule.

Response: *In connection with its decision to not regulate GHG emissions from refineries, EPA indicated that while it believes it has the discretion during the 8-year NSPS reviews to limit its review to those air pollutants for which it already established an emission standard, EPA also has the discretion to expand the NSPS to cover additional pollutants as well where appropriate.*[1] *Indeed, the Agency noted that on a number of occasions, including in connection with the refineries NSPS, it had in fact added additional pollutants. Thus, the fact that EPA has not issued NSPS for GHG emissions from lead production (or any other NSPS source category) does not mean that EPA cannot do so in the future.*

Regarding the more specific argument that EPA already knows enough about GHG emissions from lead production to eliminate the possibility of an NSPS standard, EPA disagrees. The goal of a comprehensive, nationwide GHG emissions profile is to better understand the origin and distribution of GHG emissions in the United States. As noted in the preamble to the proposed and final rule, national inventory uses top-down methods to develop estimates of entire sectors. As a result, they lack detail on specific facilities within sectors, which is critical to the policy issues before EPA. At this time EPA has not made any final decisions about issuing (or not) emission standards for any existing NSPS source categories, nor has EPA indicated how it would make such a decision. Moreover, as noted above, the emissions information will assist in carrying out other provisions of the CAA as well.

Comment: Some commenters argued that EPA fails to cite any specific provision of the CAA giving it authority to require reporting by upstream sources of industrial GHGs such as producers and importers of these gases. They stated that CAA § 114 relates primarily to statutory programs relevant to emissions of pollutants from stationary sources.

Some commenters noted that, to date, some fluorinated gases such as HFCs are not regulated as pollutants under the CAA. They argued that the existing authority for reporting of ozone depleting substances ("ODS"), such as HCFCs, is found in Title VI of the CAA, which is not specifically referenced by CAA § 114. Consequently, they continued, it is far from clear that EPA has authority under the CAA to require reporting from producers and manufacturers of HFCs and other unregulated fluorinated GHGs. For these same reasons, they questioned whether a violation of the Reporting Rule, particularly regarding suppliers of unregulated industrial GHGs such as HFCs, can be enforceable under the CAA.

Regarding subpart MM, Suppliers of Petroleum Products, some industry commenters argued that EPA is exceeding its authority granted under the 2008 Appropriations Act to collect greenhouse gas emissions data. They contended that "emissions" mean material that is actually discharged into the air, and thus, EPA does not have authority to collect product emissions, or

[1] *We note that the Agency's decision not to regulate GHGs form refineries is currently the subject of a pending petition for reconsideration. That petition questions EPA's conclusion that the decision to add addition pollutants is discretionary, not mandatory.*

production and distribution information, in this rule. On the other hand, another commenter took the position that reporting of fuel production information is a reasonable requirement and relevant to EPA's mission under the CAA, as acknowledged in the proposed rule in anticipation of needing "useful information to EPA to assess the lifecycle GHG emissions associated with petroleum refining."

Response: *As noted above, section 114 authorizes EPA to gather information from any person who is subject to a requirement of the Act (other than engine manufacturers) or who may have information the Administrator believes is necessary for purposes of section 114(a) (which in turn references carrying out any provision of the Act). Many suppliers of petroleum products are subject to requirements under section 211 of the Act and thus are covered by section 114. In addition, the Administrator believes that other upstream suppliers have information that is necessary for purposes of carrying out an evaluation of how to use the CAA to address GHG emissions and climate change. As discussed above, emissions data are not limited to information regarding the actual level of emissions from a smokestack. Moreover, as also discussed above, EPA is issuing this rule under section 114 of the CAA, which allows EPA to gather any information it deems necessary for carrying out any provision of the Act.*

The information gathered from suppliers of fossil fuels, in particular petroleum products, is relevant to an evaluation of possible regulation of fuels under title II of the CAA, as well as for potential efforts to address GHG emissions at downstream sources. Note that some vehicles use natural gas as a fuel, and that there is interest in expanding the use of natural gas as a transportation fuel, thus information from natural gas suppliers will assist EPA in its evaluation of whether to undertake possible programs to promote natural gas as a transportation fuel.

Information regarding fuel supply will also allow EPA to evaluate potential options for downstream emitters. For example, fuel switching and the use of clean fuels are possible technologies to be evaluated for stationary source standards and technologies. As standard fuels become more expensive and more scarce, stationary sources may consider burning less traditional fuels. Knowing the volume of the various types of fuels and their distribution will help EPA evaluate options. For example, knowing the US inventory of natural gas will help us evaluate which stationary source sectors using natural gas to prioritize for potential NSPS standards based on the percentage of the natural gas inventory they represent. It will help us evaluate which categories of sources and what size units in those categories make sense from an emissions standards perspective.

This information will also help EPA evaluate whether this rule does collect information from the vast majority of combustion sources, or whether there may be downstream pockets of missing data we should consider collecting. We also are requesting information about non-fuel products made from the same feedstocks as the fuels from suppliers to allow us to verify the fuel production numbers (e.g., will allow us to utilize mass balance approach to verify calculations) .

Information from suppliers of industrial greenhouse gases is relevant to understanding the quantities and types of gases being supplied in the economy, in particular those that could be emitted downstream which will aid in evaluating action under CAA section 111, as well as various sections of title VI (e.g., 609 and 612) that address substitutes to ozone depleting substances. For example, information regarding HFC production will assist us in calibrating the model we use to estimate HFC emissions from air conditioning units. If and when we go final with regulations covering users (and therefore direct emitters) of these industrial GHGs (e.g., electronics manufacturing), the information from suppliers will help us quality assure the

information from direct emitters and determine if there are additional sources of emissions from which we need to gather information. In the meantime, it will give us a picture of the amount of such GHGs in commerce, and used by such direct emitting categories.

We note that although section 114 does not list title VI explicitly, the requirements of title VI are clearly provisions of the CAA and covered by the phrase "any provision" of the Act discussed above. If Congress had intended to exclude title VI from section 114, it would not have used such a broad phrase, and it could have made an explicit exclusion. Indeed, EPA has repeatedly used its authority under section 114 to carry out various provisions of Title VI. For example, prior to promulgating a rule establishing the critical use exemption program under section 604(d)(6) of the Clean Air Act, EPA relied on section 114 as authority for collecting information on the amount of methyl bromide held in inventory (69 FR 52403).

Regarding the collection of information related to nitrogen-based fertilizers from sources already reporting under the rule, this data will help EPA evaluate the use of fertilizers as a source of N2O emissions. Such information will also inform potential upstream emissions analysis undertaken for fuels under section 211. EPA may subsequently gather additional information to hone its analysis, but EPA believes that this information, from sources such as ammonia and nitric acid manufacturing, will provide a good foundation for further evaluation of this source of GHG emissions.

The response to comments documents on specific subparts may provide additional rationale supporting the collection of specific data elements.

Comment: At least one commenter argued that sections 114 and 208 of the Clean Air Act do not authorize the reporting of data under proposed subpart DD regarding SF6 from electrical equipment. In particular, they challenged our ability to require reporting of SF6 nameplate capacity.

Other commenters challenged EPA's authority to gather information from coal suppliers under proposed subpart KK. In particular, they argued that coal supplier reporting is not necessary to accomplish this goal of GHG data collection in all sectors of the economy because EPA's proposed regulations also require direct reporting by virtually all sources in the economy that combust coal, including electric generating units ("EGUs") and other industrial sources. As a result, they continued, data collected through coal supplier reporting would be almost completely duplicative of data collected through direct reporting by those who actually combust the coal. Another commenter questioned EPA's ability to require coal exporters to provide carbon content of shipments, in part because the GHG emissions would be generated outside the U.S. One commenter argued that as a threshold requirement for including this category, EPA must supply an interpretation of the critical term "appropriate," set forth the factors it considered in applying the "appropriateness" standard, and explain how and why these factors led it to conclude that a particular reporting category should be required (citing Motor Vehicles Man. Ass"n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

At least one commenter questioned the need for data on electricity purchases, which they argued was far removed from the statutory language regarding collection of emissions data.

Response: *As discussed in the final rule preamble, at this time, EPA is not going final with proposed subparts DD or KK, or with gathering information on electricity purchases. Thus, we are not responding to the comment regarding our legal authority for those subparts now. As*

EPA considers next steps, we will be reviewing the public comments and other relevant information.

Comment: Some commenters argued that 114 can be used only for the collection of information related to pollutants that EPA has already regulated. For example, they argued that EPA could not gather information on GHGs until after it had finalized the proposed endangerment finding under section 202(a). Others similarly argued that EPA could gather information only from regulated sources, only after regulations were issued.

More specifically, they pointed out that section 114 cites to the development of implementation plans under section 110, and emissions standards under sections 111 and 112, to support their argument that certain findings regarding pollutants have to occur before those actions can occur, and hence before information regarding those pollutants can be gathered. For example, they argued that before standards can be developed under Section 110, a NAAQS must be set, yet because EPA has yet to determine if GHGs are a regulated pollutant under the Act or develop a standard under Section 110 that would be a NAAQS determination, section 114 could not be used to "develop or assist in the development" of an implementation plan. They made a similar argument regarding sections 111 and 112. Until those activities take place, commenters argued, GHGs are not subject to the CAA and cannot be the subject of a 114 information request.

Response: *As discussed earlier and in the preamble to the final rule, we disagree with commenters who argue that we cannot use sections 114 or 208 of the CAA to gather information on a pollutant until we have issued an endangerment finding for that pollutant, or actually decided to regulate it under the CAA. As discussed above, the statute is not so inflexible. For example, the information collected under sections 114 and 208 could inform the contribution element of endangerment determinations (e.g., whether emissions from the relevant sector contribute to air pollution which may reasonably be anticipated to endanger public health or welfare). Similarly, information gathered under these sections could inform decisions on whether to regulate a pollutant or source category. Indeed, section 112(b)(4) clearly states that "the Administrator may use any authority available" to acquire additional information when evaluating whether to modify the list of hazardous air pollutants under section 112(b), indicating that Congress anticipated EPA would gather information on a pollutant before deciding, indeed as part of deciding, whether the pollutant poses a danger. Commenters' interpretation would prevent EPA from gathering information that could be critical to key decisions until after those decisions are made. EPA does not agree with, and will not adopt, such an interpretation.*

1.1.3 Miscellaneous

Comment: Commenters argued that the rule is unjustifiably complex and exceeds EPA's statutory authority as intended by Congress. Specifically, they stated that the rule seems to be based on the California Climate Registry program and the United Nations' Intergovernmental Panel on Climate Change GHG emission estimation methodology, rather than on the statutory language authorizing EPA to promulgate a GHG reporting rule. They proposed that as an alternative to the current proposal, EPA easily could have satisfied its obligation under the 2008 bill by simply requiring that emissions of carbon dioxide, methane, nitrous oxide and the other GHGs be reported under the TRI program or a similar program established under the Clean Air Act.

Response: *Commenters do not specify exactly how they believe EPA exceeded its*

authority, or why drawing on accepted existing emission estimation methodologies in the development of the requirements in this final rule is inappropriate – rather they merely claim that EPA went beyond the bare minimum necessary to satisfy the language in the Appropriations Act. EPA has developed a rule that will generate the type and level of information the Agency believes is appropriate for purposes of undertaking a comprehensive evaluation of whether and how to utilize the CAA to address GHG emissions and climate change. Generally, although EPA reviewed existing methodologies when developing the proposed rule, it based the rule on those methodologies that were appropriate for CAA purposes. The proposed rule and the final rule talk at length about EPA's analysis of existing methodologies and how we developed the requirements of the final rule. See elsewhere for a discussion regarding use of the TRI.

Comment: Commenters argued that the relevant Appropriations Act language is best interpreted to require that EPA consider both upstream and downstream sources, but that it had to pick between collecting data from upstream or downstream sources. In other words, that EPA was not authorized to collect data from both entities (e.g., to "double" count emissions). They argued that in many cases, it is needlessly costly and burdensome for EPA to require reporting of the same unit of GHG at the point of emission and further upstream. If there are compelling policy reasons in specific situations that would justify the collection of both upstream production and downstream sources, they continued, those situations and policies need to be clearly identified.

Response: *We disagree with commenters' position that the language of either the Appropriations Act or the joint explanatory statement limits EPA's authority to gather information from both upstream and downstream sources, even when that information may cover the same eventual GHG emissions. Language in the joint explanatory statement directs EPA to include reporting from "upstream production <u>and</u> downstream sources." (Emphasis added). The language does not say upstream production <u>or</u> downstream sources, indicating that information from both types of sources could be collected "to the extent the Administrator deems it appropriate." The language is clearly authorizes EPA to collect information from both upstream and downstream sources, as long as the Administrator believes it is appropriate.*

In response to numerous specific comments on methods for monitoring and calculating GHG emissions, reporting requirements, and other comments related to the burden estimated for this rule, EPA made many changes to the rule to clarify and simplify the requirements and to reduce burden. Thus, EPA has already undertaken efforts to address the burden concern underlying this comment.

As discussed above and in other response to comment documents, the information being gathered by this rule will inform a wide variety of regulatory and nonregulatory CAA options under consideration. While EPA may be gathering information from both upstream and downstream sources, it is not "double counting" them to the extent it is not merely adding the totals provided by all parties to arrive at a single total for the country. As explained elsewhere, the data from upstream suppliers will provide information relevant to carrying out the CAA, either by helping verify downstream source information, or providing details of fuel and industrial gas supplies that cannot be garnered in the same level of accuracy from downstream sources covered by this rule. EPA has undertaken efforts to minimize the burden on all reporting entities and concludes that we have a balance regarding the information requested and the burden on the regulated community.

Comment: At least one commenter argued that the decisions by EPA regarding which businesses and what sectors of the economy would be required to measure and report greenhouse gas emissions, as related to which sectors may become subject to regulation, involved choices which will affect different industries and regions of the nation in different ways and that these choices are best made by elected representatives through Congressional hearings, markups and legislative efforts. They note that the legislative process for addressing climate-change, while dormant in recent years, has begun, and urge EPA to cede the legislative initiative. The commenter took the position that while authority for the proposed rule may exist in the Clean Air Act, the rule is not required by the FY2008 Consolidated Appropriations Bill, and that the stated purpose of providing information for additional policy decisions is not pressing.

Response: *President Obama and Administrator Jackson have both indicated their preference for comprehensive legislation to address the challenge of climate change. Nonetheless, especially in the absence of such legislation, EPA must move forward in its evaluation of existing authority under the CAA. EPA must address the numerous pending petitions, remands, ongoing rulemakings and litigation before it. Moreover, the issue of climate change is too important to delay the gathering of information critical to development of any future programs.*

1.2 CONFIDENTIAL BUSINESS INFORMATION (CBI)

Comment: EPA received numerous comments addressing the issue of CBI. Industry commenters generally expressed concern that much of the information reported under this rule would be CBI (e.g., production and process data). Many commenters also presented arguments regarding why certain information would not be "emissions data" under the CAA. Among the various recommendations were that the final rule (i) not require the reporting of such information at all, (ii) require only that the source maintain such information on site, but not report it to EPA, and/or (iii) clearly state that some classes of information are CBI. Some commenters expressed concern about EPA's ability to maintain the confidentiality of CBI, and thus suggested that EPA should provide further detail regarding how we will protect CBI from disclosure. The agricultural industry expressed particular concerns about making information about the location of facilities public due to concerns about biosecurity and other potential threats. Other commenters favored the wide dissemination of information, and argued that the information gathered under this rule should be "emissions data" and hence not protected as CBI.

Response: *Please see section II.N of the final rule preamble for a response to these comments.*

1.3 RELATIONSHIP TO OTHER CLEAN AIR ACT PROGRAMS

Comment: We received numerous comments on EPA's statements in the proposed rule that a final rule requiring the monitoring and reporting of GHG emissions would not render greenhouse gases "regulated pollutants" under the Clean Air Act. See, e.g., 'EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008) ("PSD Interpretive Memo). Some commenters agreed with the PSD Interpretive Memo, while others objected to the position in the memorandum. Many commenters asked EPA to state clearly that this final rule does not make GHGs regulated pollutants. At least one commenter suggested that EPA complete its

reconsideration of the PSD Interpretive Memo prior to finalizing any greenhouse gas emissions reporting rule.

Response: *At this time, this reporting rule would not make GHGs pollutants subject to regulation under the Act, as it does not provide for actual control of emissions. See, e.g., The PSD Interpretive Memo. While EPA is reconsidering the PSD Interpretive Memo, it did not stay the effect of the memorandum. At this time that memorandum reflects EPA's current position, and hence, this final rule does not make GHGs subject to regulation under the Act. We are not responding to any comments submitted in this rulemaking on the merits of the Agency's current position because they are outside the scope of this rulemaking. As we noted in the proposal, EPA is reconsidering the PSD Interpretive Memo and will be seeking public comment on the issues raised in it. That proceeding, not this rulemaking, is the appropriate venue for submitting comments on the substantive issue of whether monitoring regulations under the CAA should trigger PSD.*

Comment: EPA also received numerous comments about whether the requirements imposed by this rule are "applicable requirements" under the title V operating permit program. The majority of the comments took the position that the current definitions of "applicable requirement" at 40 CFR 70.2 and 71.2 do not include a rule such as this, promulgated under section 114(a)(1) and 208 of the CAA. Commenters requested that EPA confirm their interpretation of the regulations. One commenter apparently presumed that title V permits would have to be revised to include the parametric monitoring requirements of this rule, and requested that additional time be allowed for this transition.

Response: *EPA agrees that as currently written, the definition of "applicable requirement" in 40 CFR 70.2 and 71.2 does not include a monitoring rule such this final reporting rule, which is promulgated under CAA sections 114(a)(1) and 208.*

Comment: Some commenters noted statements by the Administrator regarding the 25,000 tpy CO2e threshold in this rule as evidence of how the Agency would target any future CAA programs. These commenters questioned EPA's ability to set PSD applicability thresholds higher than the statutory levels of 100 and 250 tpy and urged EPA to prepare and publish for public review and comment a supplemental statement of its intent on this issue before it takes any further action.

Response: *This comment is beyond the scope of this rulemaking. However, as discussed above, EPA is considering options addressing this issue and the public will have the opportunity to comment on any proposal.*

1.4 COMMENTS RELATED TO RULEMAKING PROCEDURES

1.4.1 Inadequate notice and comment

Comment: Some commenters argued that the comment period for the rule was inadequate, especially considering the complexity of the rulemaking, and therefore rendered the rule arbitrary and capricious as a legal matter. Specifically, they contended that by denying requests for an extension of the comment period, EPA has failed to "allow interested parties to comment meaningfully," as required under the Administrative Procedures Act (APA). 5 U.S.C. § 553. Commenters discussed how notice and comment requirements are designed to (1) ensure

that agency regulations are tested via exposure to diverse public comment, (2) ensure fairness to affected parties, and (3) give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. They noted that EPA has a duty to give full and fair consideration to such comments (citing ACLU v. FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987) ("Notice and comment rulemaking procedures obligate the [agency] to respond to all significant comments, for 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public'"); Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir. 1975) (agencies have a duty to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.")).

Commenters compared this rule to a rule in which the court held that EPA had failed to provide adequate notice and opportunity to comment when it revised its definition of "electricity generating unit" in a rulemaking with only a 60-day comment period, because the revised definition was highly technical, had never been used in a prior regulatory context, and after many commentators stated that the comment period was inadequate. Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). Commenters argued that this proposed rule is vastly more complicated than the redefinition of a single term (as in Michigan), and thus that the court's reasoning in Michigan applies all the more to the NPRM.

Response: *The official public comment period on the proposed rule was adequate. Notably, commenters did not allege that EPA did not meet the minimum CAA statutory requirements for public comment and the opportunity for a public hearing. Prior to developing the proposal EPA undertook an extensive, if not unprecedented, public outreach effort, talking with more than 300 people, representing more than 100 industries and interest groups. Thus, before EPA had even proposed the rule it had discussed the concepts and ideas and technical matters with dozens of stakeholders. Moreover, while the public comment period closed 60 days after the proposal was published in the Federal Register, that date was 90 days after the rule in its entirety was available on EPA's webpage. Thus, in addition to the opportunities provided to stakeholders to discuss the issue with EPA before the proposal was signed, the public essentially had 90 days in which to review and comment on the proposal. Indeed, EPA received over 16,800 comments on the proposal. In addition, since the proposal was signed, EPA has talked to more than 4000 people, representing over 150 groups. Thus, interested stakeholders have had ample opportunity to present their positions to EPA.*

Moreover, while the rule is comprehensive and covers many industrial sectors, most industry commenters would need to review only certain portions of the rule. Finally, the extensive response to comments documents in the docket demonstrate EPA's careful consideration of the significant comments received on the proposal. Indeed, EPA has made several changes to the final package in response to those comments.

EPA also disagrees that Michigan v. EPA stands, either explicitly or implicitly, for the proposition that a 60-day comment period is insufficient as a legal matter for complex rules. That case involved the definition of "EGU" (electric generating unit) which was relevant for regulatory purposes. As the court noted, throughout the rulemaking process EPA defined EGU as it did under the CAA Acid Rain program. However, two months after adopting that definition in the final rule, which was issued in October 1998, EPA issued a "Corrections Rule" that, among other things, redefined EGU and provided an opportunity for public comment on the new issues in the Corrections Rule. In response to comments on the revised definition, EPA claimed

that a May 1998 Supplemental Notice provided the public with notice of the new definition and allowed for 60-days to comment. The court rejected EPA's claim that the new definition was a logical outgrowth of the proposed rule because the definition in the supplemental notice concerned a different regulatory purpose. Additionally, the court held that the comment period on the Corrections Rule was inadequate for purposes of the redefinition because EPA rejected comments on this issue primarily by claiming that the May 1998 Supplemental Notice provided sufficient notice to the public of the new definition. 213 F.3d at 691-93. Thus, the court did not address whether a comment period of any sufficient length was adequate, but rather whether EPA's proposal (including any supplemental proposal) gave the public adequate notice of the approach it ultimately adopted in the final rule. There is nothing in the opinion to support a claim a 60-day public comment period is inadequate for any purpose.

EPA's denial of the requests for extension of the comment was entirely reasonable in light of the above extensive outreach efforts and opportunity for public comment, and especially considering the statutory deadline for issuing the final rule (June 2009) and Congressional interest that we begin collecting data in 2010.

1.4.2 Inadequate explanation and consideration of alternatives

Comment: Some commenters argued that EPA's proposed rule was illegal because it contained inadequate explanation of its decision making process and/or it failed to adequately consider alternatives. Specifically, at least one commenter argued that the rule fails to demonstrate a rational consideration of the key issues, as well as alternatives to its preferred approach, citing the Administrative Procedures Act and Citizens of Overton Park v. Volpe (1972). They argued that as proposed, the rule does not consider alternative regulatory reporting thresholds that could achieve its primary objectives at significantly lower cost and burden to covered sources. Commenters continued that without consideration of the Clean Air Act's well-established structure of federal and state permitting roles—the rule creates a new, "hybrid" category of sources that are not "major" for Title V purposes, but are effectively deemed major GHG emissions sources.

Response: *As is demonstrated in the proposal package (including the FR notice, RIA and Technical Support Documents) and the final rule package (including the FR notice, RIA, and Response to Comment Documents), EPA considered and solicited comment on a variety of options and alternatives for each element of the reporting rule as a whole, and within the individual sectors. For example, EPA explained the various thresholds it considered, both in metric and levels (e.g. capacity versus emissions, and 10,000 tpy vs, 25,000 tpy). There are hundreds, if not thousands, of pages setting forth EPA's decision making process, including its consideration of alternatives. Commenters' general allegations do not indicate how this robust discussion of the decision making process somehow failed to meet statutory or judicial requirements. As for the comment that EPA has created a "hybrid" definition of major stationary source that is at odds with the statutory definition for various permitting programs, this rule does not define major source at all. Rather, it establishes a general threshold above which source should report GHG emissions information.*

1.5 OTHER LEGAL COMMENTS

1.5.1 Information Quality Act

Comment: One commenter submitted comments alleging that EPA has not complied with the Information Quality Act (IQA) in the proposed rule. Specifically, it asserted that EPA had failed to "include a review of the data quality" in the preamble to the proposed rule. The commenter requested that EPA include a review of data quality in the mandatory GHG reporting rule in "IX. Statutory and Executive Order Reviews."" It noted that "collected GHG emissions information must be of high quality to assure public confidence as well as information reliability in respect to all uses for which the collected data are intended," and suggested that "attention to assuring information quality" for the data EPA would collect under this rule "is one aspect of the proposed rule." The commenter also expressed concern that some groups will use the data submitted under this rule to "castigate and vilify 'non-performers'" and that nobody "should be subjected to such treatment on the basis of poor quality, unreliable data." Finally, it stated that "the quality of GHG emissions data that is disseminated to the public must be assured."

Response: *EPA has fully complied with the requirements of the Information Quality Act (IQA). The IQA is designed to "ensur[e] and maximize[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." Public Law 106-554; 44 U.S.C. 3516, note. Following guidelines issued by the Office of Management and Budget, EPA released its own guidelines to carry out the objectives of the IQA (http://www.epa.gov/QUALITY/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf). EPA's Information Quality Guidelines (EPA IQG) provide a detailed administrative process to address any challenges to data quality issues in data disseminated by EPA. These guidelines would apply to information collected pursuant to this rule which is made public by EPA.*

The IQA does not require EPA to include a review of data quality in the preamble to this rule. As noted by the commenter, the IQA only requires that the agency "issue guidelines" ensuring data quality: EPA issued such guidelines in 2002. These guidelines established a thorough administrative mechanism under which the agency may review data quality once it has data available to review. To the extent that the comments suggest that the IQA is the only mechanism that affords the public an opportunity to examine the quality and reliability of data, we disagree. For example, the notice and comment rulemaking procedures for any future rulemaking based on the information collected by this rule would provide the public with an opportunity to examine the quality and reliability of data underlying that decision.

EPA believes the reporting system established by the GHG reporting rule is consistent with the EPA IQG. To the extent that the commenter is requesting that EPA review data submitted under the final GHG reporting rule, EPA intends to do so using the existing processes described in the EPA IQG. As noted in the preamble for the proposed rule, and consistent with the IQA and the EPA IQG, the dissemination of the collected data is intended to facilitate greater transparency and to maximize quality. The preamble and other response to comment documents discuss how EPA plans to verify and quality assure the information submitted under this rule generally, and specifically before it is shared with the public. EPA agrees that accurate and timely information on GHG emissions is essential for informing many future climate change policy decisions. This consideration is one reason supporting EPA's decision regarding the appropriate level of monitoring, recordkeeping and reporting in this rule, as well as the data systems and EPA verification process. As discussed in this RTC, there are a wide variety of possible uses of this information under the CAA, and EPA is committed to collecting, and using,

high quality data for these efforts. EPA encourages interested parties to raise any concerns within the Agency's existing data quality review framework at an appropriate time.

EPA is not interested in data of poor quality, and encourages the entities submitting data under the GHG reporting system to provide data of the highest quality possible. In addition, as noted in the EPA IQG, though we cannot be responsible for how data is used by others, EPA is committed to ensuring the quality of the data and will use the procedures described in the EPA IQG to achieve that goal

1.5.2 Agriculture concerns

Comment: Some members of the agricultural industry commented that their industry is unique and that therefore, rather than being folded into this regulatory reporting program, they should be subject to individual 114 information requests to the extent appropriate. They generally requested that EPA rethink using the CAA for GHG emissions from agricultural activities. They were worried that while the rule may set forth reasonable terms for other sectors of the U.S. economy to report emissions, the proposal would have the perverse effect of steering pork producers toward activities that, on balance, will actually cause more environmental harm, including increased emissions (e.g., the reluctance to improve the performance of a farm's manure management systems to enhance water quality because it would trigger the increased reporting burden associated with the current proposal; rejection of EPA's Ag Star program encouragement to install of manure digesters).

Commenters also recommended that any agricultural programs be referenced to the U.S. Department of Agriculture (USDA) due to their experience with farmers regarding agricultural practices, as well as their statutory authority under various statutes (e.g., the 2008 Farm Bill).

Members of the agricultural industry also argued that nothing in the Clean Air Act or the Consolidated Appropriations Act authorizes a rulemaking that limits GHG reporting to anthropogenic (or derived from human activities) emissions (e.g., exempting enteric fermentation). They appeared to disagree with EPA's considering emissions from manure management systems as anthropogenic. They argued that EPA seems to pick and choose "emissions" making some C02e emissions reportable and other C02e emissions not reportable, without justification or analysis.

Response: *We considered the comments submitted by the agricultural community, and are requiring manure management systems at large livestock operations that exceed the reporting threshold to report under the final rule. The rationale for the decision to include manure management and exclude other agricultural sources is described in the preamble to the rule and response to comments documents on Source Categories Covered (Vol.1) and Subpart JJ (Manure Management) (Vol. 46). EPA has coordinated the manure management provisions with the USDA and we continue to work with them on issues involving agriculture.*

1.5.3 SEC Filing Concerns

Comment: At least one commenters noted concern about how the rule could have significant unforeseen consequences for publicly-traded corporations subject to filing requirements mandated by the SEC in the event the data reported under the NPRM would be considered material information for these SEC reports. They referenced a petition for a rulemaking requiring SEC-regulated businesses to disclose their carbon footprint that is pending

with the SEC. See Coalition for Environmentally Responsible Economies – Petition for Interpretive Guidance on Climate Risk Disclosure, filed Sept. 18, 2007. They also noted that a publicly traded company recently agreed to a settlement with the New York State Attorney General that requires the company to disclose GHG emissions data in connection with SEC Regulation S-K filings. See Dominion Resources Form 10-K for fiscal year ending December 31, 2008 (filed Feb. 26, 2009 with the SEC). They expressed concern that these developments raise questions as to how data generated under the NPRM should be reported under SEC requirements, if at all. They recommended that EPA delay finalization of the NPRM until it has coordinated with the SEC and interested stakeholders on public disclosure requirements of GHG emissions data generated under the NPRM for publicly-traded companies.

Response: *Concerns about SEC reporting responsibilities are beyond the scope of this rulemakings. EPA, stakeholders and Congress have an interest in having this rule become effective for reporting year 2010, and delaying the rule further per this recommendation would preclude finalizing the rule in time for that reporting year.*

1.5.4 Preemption of State Reporting Programs

Comments: Numerous commenters expressed an opinion about whether this federal GHG reporting rule should preempt State and local reporting programs. As a general matter, industry commenters supported preemption, while state and NGO commenters opposed it.

Commenters in favor of preemption noted the existence of numerous State and local GHG reporting programs. They raised concerns about duplicative and conflicting reporting requirements. In particular, they wanted to avoid different verification, monitoring, and emissions estimation procedures, and that would be inefficient and time consuming for the regulated entities and is likely to result in inconsistent data. Some commenters alleged that EPA has experienced such difficulties with the National Emission Inventory database, which is used to model national air quality trends, and argued that EPA should avoid similar difficulties regarding GHG reporting. Commenters generally noted that multiple reporting programs will make integration of databases and information sharing more difficult. Some commenters argued that federal preemption would be consistent with the President's May 20, 2009 Memorandum for the Heads of Executive Departments and Agencies on Preemption because this rule is so comprehensive it could be seen as "occupying the field" in terms of collection of GHG emission data. They argued that because the information proposed to be collected would be available to state or local regulators, state or local regulators could not have a need for any additional data sufficient to justify additive, non-uniform GHG emission reporting requirements in some states.

These commenters essentially believed there should be one consistent, harmonized, nationally applied emission reporting system to increase the integrity of the data and avoid duplication of effort at the source level. Some commenters recommended a limited, conditional federal preemption policy and procedure (e.g., preempt where industries, thresholds and reported information are similar; allow states to adopt different thresholds but require adherence to same measurement protocols). Other commenters were in favor of complete and permanent preemption of State and local programs. Still others suggested that if EPA did not preempt State and local programs, it should accept information submitted to those programs under the federal rule, or vice versa. Some suggested immediate preemption, while others recommended sunsetting of the State and local programs.

Commenters opposed to preemption urged EPA to add a 'savings' clause to the final rule, disavowing any attempt to preempt regional, state, and local programs. They requested a plain, explicit savings clause in the rule itself to prevent unnecessary litigation and avoid substantial disruption in the vital state programs. They argued that the reporting arena is ideal for state experimentation which the federal government can then learn from, and EPA should make certain that its federal rule does no harm to state programs.

Response: *As stated in the preamble to the final rule, EPA is not intending that this federal GHG reporting rule preempt state programs. There are several existing State and Regional GHG reporting and/or reduction programs, summarized in Section II of the proposal preamble (74 FR 16457, April 10, 2009). These are important programs that not only led the way in reporting of GHG emissions before the Federal government acted but also assist in quantifying the GHG reductions achieved by various reduction policies. Many of these programs collect different or additional data as compared to this rule. For example, State programs may establish lower thresholds for reporting or request information on areas not addressed in the EPA reporting rule (e.g., electricity use or emission related to other indirect sources). States collecting additional information have determined that these data are necessary to implement their specific climate policies and programs. EPA agrees that State and regional programs are crucial to achieving emissions reductions, and this rule does not preempt any other programs.*

EPA's GHG reporting rule is a specific single action that was specifically developed in response to the Appropriations Act, and therefore is targeted to accomplish the purpose of the language of the Appropriations Act and serve EPA's purposes under the CAA. As State experience has demonstrated, we recognize that in order to address the breadth of climate change issues there will likely be a need to collect additional data from sources subject to this rule as well as other sources. The timing and nature of these additional needs will be dependent on the types of programs and actions the Agency has underway or may develop and implement in response to future policy developments and/or new requests from Congress. Addressing climate change will require a suite of policies and programs and this reporting rule is just one effort to collect information to inform those policies.

EPA is committed to working with State and regional programs to coordinate implementation of reporting programs, reduce burden on reporters, provide timely access to verified emissions data, establish mechanisms to efficiently share data, and harmonize data systems to the extent possible.

We note that EPA's position that this rule does not preempt State programs is consistent with both the President's May 20, 2009 Memorandum on Preemption and the preemption provisions of Executive Order 13132, Federalism (August 4, 1999), which the Memorandum cites with approval. The memorandum stated President Obama's policy that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values." Moreover, the preemption provisions of EO 13132 on Federalism state that agencies should construe federal statutes as preempting state law or issue regulations authorizing preemption only where the statute contains an express preemption provision, there is clear evidence that Congress intended to preempt state law, or the exercise of state authority

conflicts with the exercise of federal authority. EO 13132, Section 4 (a)-(b). Finally, it appears that EPA lacks the legal authority to preempt state law in this case; such authority exists only when Congress has evidenced an intent to occupy a given field, or state law either actually conflicts with federal law or stands as an obstacle to the accomplishment of its full purposes and objectives. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). None of those requirements is met in this case.

For the reasons stated above, preemption is not appropriate in these circumstances.